

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

WILLIAM M. BRYSON, JR.
FED. REG. NO. 95662-071
VS.

UNITED STATES OF AMERICA

CIVIL ACTION NO. 07-1043

SECTION P
JUDGE DRELL
MAGISTRATE JUDGE KIRK

ORDER AND REPORT AND RECOMMENDATION

Before the court is a "Petition to Modify a Conspiracy Sentencing Fraud Sentence" filed on June 14, 2007 [doc. 1], a Motion to Appoint Counsel and Motion for Reconsideration filed on July 10, 2007 [doc. 3], and Motion for Leave to Proceed *in forma pauperis* filed on July 11, 2007. [doc. 4] Bryson is an inmate in the custody of the Federal Bureau of Prisons; he is incarcerated at the United States Penitentiary, Pollock, Louisiana where he is serving a 188-month sentence imposed following convictions in the United States District Court for the District of South Carolina. See United States of America v. William M. Bryson, Jr., No. 8:01-cr-00240.

This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. §636 and the standing orders of the court. Petitioner's Motion to Proceed *in forma pauperis* [doc. 4] is **GRANTED**. Petitioner's Motion to Appoint Counsel [doc. 3] is **DENIED**. Finally, and for the following reasons it is recommended that the petition [doc. 1] and remaining Motions [doc. 3] be **DENIED** and

DISMISSED WITH PREJUDICE.

Statement of the Case

On January 30, 2002, petitioner was convicted of conspiracy, 18 U.S.C. § 371, mail fraud, 18 U.S.C.A. § 1341, making false statements, 18 U.S.C. § 1001, money laundering, 18 U.S.C.A. §§ 1956, 1957, and conspiracy to launder money in violation of 18 U.S.C.A. § 1956(h). He was also convicted of threatening to assault a federal official, 18 U.S.C.A. § 115, and mailing a threatening communication, 18 U.S.C.A. § 876. See United States of America v. William M. Bryson, Jr., No. 8:01-cr-00240 (United States District Court, District of South Carolina) at doc. 114. On June 18, 2002, he was sentenced to serve sentences totaling 188 months. His convictions and sentences were, for the most part, affirmed on appeal to the Fourth Circuit Court of Appeals. See United States of America v. William M. Bryson, Jr., 105 Fed. Appx. 470, 473, 2004 WL 1637371 (4 Cir. 2004) (unpublished).

Petitioner's Motions for a New Trial were denied by the district court and the denials were affirmed by the Fourth Circuit Court of Appeals. See United States of America v. William M. Bryson, Jr., 106 Fed. Appx. 840, 2004 WL 1857603 (4 Cir. August 19, 2004) (unpublished) and United States of America v. William M. Bryson, Jr., 109 Fed. Appx. 641, 2004 WL 2204034 (4 Cir. September 29, 2004) (unpublished). During the pendency of his appeal, petitioner filed two §2255 Motions in the District

Court. Both were dismissed without prejudice because petitioner's appeal was pending. [See United States of America v. William M. Bryson, Jr., 8:02-cv-2634 (U.S.D.C.-S.Car.) at doc. 2; and, United States of America v. William M. Bryson, Jr., 8:03-cv-0706 at doc. 2] His Petition for Writ of Error *Coram Nobis* filed on August 26, 2003 was construed as a § 2255 Motion and was also dismissed. United States of America v. William M. Bryson, Jr., 8:03-cv-2721. His appeal of that judgment was affirmed by the Fourth Circuit in an unpublished *per curiam* opinion on February 25, 2004. See Bryson, v. United States, No. 03-7414.

On February 2, 2006 petitioner filed a § 2241 petition for writ of *habeas corpus* in the United States District Court for the Northern District of Georgia. He challenged the constitutionality of his convictions in the United States Court in South Carolina and claimed that the sentencing court improperly applied the sentencing guidelines and increased his offense level in violation of the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Since petitioner was unable to demonstrate that the remedy afforded by § 2255 was ineffective or inadequate, the *habeas* petition was denied and dismissed on April 19, 2006. See William M. Bryson, Jr. v. United States of America, No. 1:06-cv-0233 (U.S.D.C.-N.Ga.) at docs. 3 and 4.

Meanwhile, on March 8, 2006 petitioner filed a petition for

writ of *habeas corpus* (28 U.S.C. §2241) in this court. See William M. Bryson, Jr. v. Warden Fredrick Menifee, 1:06-cv-0366 at doc. 1. In the same proceeding petitioner filed Motions to Compel Credit and Calculate Sentence (28 U.S.C. §1361) [*id.*, docs. 8,9, and 10] In these pleadings petitioner claimed that the evidence was insufficient to convict him, that he was not guilty of mail fraud, that he did not "swindle" his victims, that, at worst, he was guilty of a misdemeanor under the laws of South Carolina, and, that the trial court incorrectly computed his sentence under the United States Sentencing Guidelines.

Petitioner also asked for credit for time served in the custody of South Carolina authorities. On June 16, 2006 the undersigned recommended dismissal of the claims attacking petitioner's conviction and the imposition of sentence since those claims should have been raised in a Motion to Vacate filed pursuant to 28 U.S.C. §2255 and petitioner had not shown that the remedy afforded by the statute was inadequate or ineffective to test the legality of his detention. Further, since the minutes of petitioner's sentencing were silent on the issue of whether or not petitioner should be afforded credit for time served in state custody (and, since petitioner had offered no proof to establish that he actually served time in state custody), the undersigned recommended dismissal of his sentence computation claim. See Bryson, 1:06-cv-0366 at doc. 11. Petitioner did not object and

on July 24, 2006 Judge Drell signed a judgment adopting the Report and Recommendation and dismissing petitioner's claims with prejudice. [id., doc. 12] Plaintiff appealed this judgment to the Fifth Circuit Court of Appeals [id., docs. 13-17] On December 5, 2006 the Fifth Circuit dismissed his appeal for want of prosecution. [id. doc. 18] On December 18, 2006, petitioner's motion to reinstate the appeal was granted [id., doc. 19]. On January 8, 2007 petitioner filed a "Motion to Reduce Plaintiff's Imprisonment" [id., doc. 20] which Judge Drell denied on January 10, 2007. [id., doc. 21] Petitioner filed various other motions including a motion to note that he was appealing the denial of the post-judgment motions. [id., docs. 22-24] On March 2, 2007 Judge Drell construed the motions as motions seeking a certificate of appealability (COA) and denied them. [id., doc. 25] In any event, petitioner's appeal was lodged in the Fifth Circuit under Docket Number 06-30885.

Meanwhile, on August 25, 2006 petitioner filed another post-conviction pleading in this court. William M. Bryson, Jr. v. United States of America, et al., No. 1:06-cv-1426. [docs. 1, 3, 5, 7] On January 29, 2007 the undersigned reviewed all of the pleadings and determined that since petitioner's "... claims collaterally attack the legality of his sentence, and since success in these proceedings would result in an immediate if not speedier release from custody, they are properly construed as

habeas corpus claims..." [id., doc. 10] Further, since the claims and requests for relief were virtually identical to the claims and requests for relief in case number 1:06-cv-0366, the undersigned recommended dismissal for the same reasons. [id.] Petitioner objected [id., doc. 14]. Nevertheless, on April 12, 2007 Judge Drell adopted the Report and Recommendation and ordered dismissal with prejudice. [id., doc. 15] Petitioner once again noticed his intent to appeal [id., doc. 16] On April 27, 2007 Judge Drell denied petitioner's request for a COA. [id., doc. 19] On May 8, May 21, and May 26, 2007 petitioner filed Motions for Reconsideration of the denial of his request for COA. [id., docs. 20, 24, 26] These motions were referred to the undersigned for review, report, and recommendation. On June 1, 2007, the undersigned recommended dismissal of petitioner's requests for COA as unnecessary. Dismissal of all of petitioner's post-judgment motions was recommended based on the fact that the district court had been divested of jurisdiction since these motions were filed after his appeal was lodged. [id., doc. 25] On July 10, 2007 the recommendation was adopted and Judge Drell signed an order denying petitioner's motions. [id., doc. 29] Petitioner's appeal was assigned Docket Number 07-30409 in the Fifth Circuit Court of Appeals. [id., doc. 27]

On June 12, 2007 the Fifth Circuit consolidated the appeals under Docket Numbers 06-30885 and 07-30409. The appeal remains

pending.

On June 14, 2007 petitioner filed the instant "Petition to Modify a Conspiracy Sentencing Fraud Sentence." Petitioner's pleading is particularly convoluted, however, as in the past, he again seeks review of the sentences imposed following his convictions in the United States District Court for the District of South Carolina.¹ In this pleading, petitioner contends that he "...has authority to file this his petition under the First Amendment which provides that Bryson may petition the court for a redress of his grievance which is that he did not get what he was supposed to get in that the expired updated 2000 [United States Sentencing Guidelines] Manual he was to get 6 base offense points based on Amendment 634..." [doc. 1-1, p. 5] Petitioner further alleges that he "... is not seeking release from incarceration but the sentence he would have received except for the conspiracy sentencing fraud committed upon the court..." [id.]

On June 19, 2007 petitioner was ordered to amend his pleadings by submitting his claims on approved forms. [doc. 2] On July 10, 2007 petitioner filed a "Motion for Reconsideration and Notice of Intent to Appeal." [doc. 3] In this pleading petitioner requested appointment of counsel and reconsideration and

¹ In his prayer for relief petitioner asks, "... that this Honorable Court grant all relief ... including modification of his sentence which was pursuant to a conspiracy to commit fraud upon the court and which subsequently was committed upon the court during its sentencing of petitioner on 23 May 2002..." [doc. 1-1, p. 11]

clarification of the June 19, 2007 Memorandum Order. [doc. 3] Petitioner invokes Federal Rule of Civil Procedure Rule 60(b) seeking relief from a prior judgment. More specifically he "... may be relieved from a sentencing proceeding if there was a fraud upon the court or a void judgment." [id., p. 2] He claims that he is entitled to relief under the "common law writ of habeas corpus" and that his current application is a "non-2241 writ of habeas corpus ... available under the common law ..." He contends that "...Warden Menifee's manner of executing Bryson's sentence at USP Pollock is contrary to mandatory sentencing rules as provided by the Sentencing Reform Act of 1984 and other pre-1984 sentencing laws ..." He argues, "Therefore, petitioner means to say not illegally, but unlawful as the sentence itself is what is illegal rather than Warden Menifee's actions." [id., p. 4]

Nevertheless, petitioner's original "Petition to Modify a Conspiracy Sentencing Fraud Sentence" [doc. 1] and his "Motion for Reconsideration and Notice of Intent to Appeal" [doc. 3] collaterally attack the sentence imposed following his 2002 convictions in the United States District Court for the District of South Carolina.

Law and Analysis

1. Appointment of Counsel

A federal prisoner seeking *habeas corpus* relief has no right to appointment of counsel. McFarland v. Scott, 512 U.S. 849, 857

n. 3, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994). Further, petitioner has previously been advised that this court cannot and will not entertain his repeated attacks on the legality of his sentence. He has not shown that the ends of justice require that counsel be appointed for him. See Schwander v. Blackburn, 750 F.2d 494, 502-03 (5th Cir.1985). Therefore, his request for appointment of counsel [doc. 3] is **DENIED**.

2. *Habeas Claims*

Petitioner has added nothing of substance with respect to this latest attack on the legality of his sentence. He continues to repackage his claims, but the substance remains the same. Petitioner continues to collaterally attack the sentence he is serving by claiming that the court which imposed the sentence either erred or participated in a conspiracy to deprive him of his liberty. For the reasons set forth in the Report and Recommendation filed in Case Number 1:06-cv-0366 at doc. 11, and the Report and Recommendation filed in Case Number 1:06-cv-1426 at doc. 10,

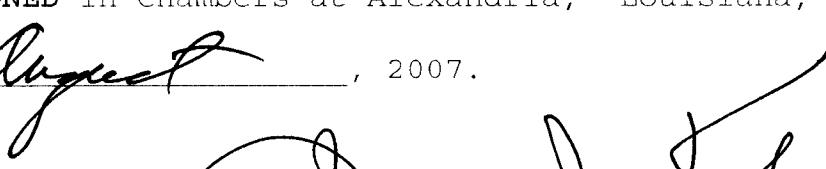
IT IS AGAIN RECOMMENDED THAT the "Petition to Modify a Conspiracy Sentencing Fraud Sentence" [doc. 1] and the "Motion for Reconsideration and Notice of Intent to Appeal" [doc. 3] be **DENIED** and **DISMISSED WITH PREJUDICE**.

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ.Proc. 72(b), parties aggrieved by this recommendation

have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

Failure to file written objections to the proposed factual finding and/or the proposed legal conclusions reflected in this Report and Recommendation within ten (10) days following the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. See *Douglas v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

THUS DONE AND SIGNED in Chambers at Alexandria, Louisiana,
this 19 day of August, 2007.


JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE